

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BRANDON KEITH EVANS, )  
Plaintiff, ) Case No.: 2:21-cv-02247-GMN-VCF  
vs. )  
WILSON BERNALES, *et al.*, )  
Defendants. )  
)  
)  
**ORDER**

Pending before the Court is the Motion to Dismiss, (ECF No. 15), filed by Defendants Wilson Bernales, Ben Gutierrez, Michael Minev, Nonilon Peret, and Julie Williams (collectively, “Defendants”). Plaintiff Brandon Keith Evans (“Plaintiff”) filed a Response, (ECF No. 20),<sup>1</sup> to which Defendants filed a Reply, (ECF No. 21). For the reasons discussed below, Defendants’ Motion to Dismiss is **GRANTED in part and DENIED in part.**<sup>2</sup>

## I. BACKGROUND

This case arises from Defendants' alleged deliberate indifference to Plaintiff's serious medical needs while he was incarcerated at High Desert State Prison ("HDSP"). (Screening Order 3:17-18; 10:4-6, ECF No. 6). Plaintiff alleges that he suffers from severe fibromyalgia that causes him extreme, full-body pain. (FAC at 5, ECF No. 5). Before he was incarcerated, Defendant was diagnosed with fibromyalgia by three different doctors. (Screening Order 4:5-10). One of these doctors prescribed a variety of treatments for Plaintiff, including eating a

<sup>1</sup> In light of Plaintiff's status as a *pro se* litigant, the Court has liberally construed his filings, holding him to standards less stringent than formal pleadings drafted by attorneys. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

<sup>2</sup> Also pending before the Court is Plaintiff's Motion for Enlargement of Time, (ECF No. 17). Plaintiff requested additional time to respond to Defendants' Motion to Dismiss because he had limited access to the law library in prison. (Mot. Enlargement of Time 3:10–12). Defendants did not oppose Plaintiff's request. (Resp. Mot. Enlargement of Time 1:22–23, ECF No. 19). Accordingly, the Court **GRANTS** Plaintiff's Motion for Enlargement of Time *nunc pro tunc*.

1 gluten-free diet. (*Id.* 4:8–10; 5:14–15). When he was incarcerated at HDSP, Plaintiff informed  
 2 the intake nurse about his condition and was told that he would soon see a doctor for a  
 3 complete exam and could discuss it then. (*Id.* 4:11–12).

4 Plaintiff has seen several doctors and nurse practitioners at HDSP, including Defendant  
 5 Dr. Wilson Bernales. (*See id.* 4:13–7:11). Despite numerous requests for treatment of his  
 6 condition, the only treatment Plaintiff received at HDSP was Tylenol, which was not effective  
 7 in treating his pain. (*Id.* 5:1–17). And, Plaintiff has received only one single packet of Tylenol.  
 8 (*Id.* 5:6–7). Plaintiff has also been unable to get a gluten-free diet order from a medical  
 9 provider at HDSP, which is the only way to receive food on that diet from culinary. (*Id.* 5:15–  
 10 17). After pursuing the grievance process, Plaintiff filed his Complaint in this Court. (*Id.* 4:23–  
 11 7:11). Following the Court’s Screening Order, the sole remaining claim is Plaintiff’s Eighth  
 12 Amendment claim for deliberate medical indifference to his fibromyalgia condition.<sup>3</sup> (*See*  
 13 *generally id.*).

14 **II.           LEGAL STANDARD**

15 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon  
 16 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
 17 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on  
 18 which it rests, and although a court must take all factual allegations as true, legal conclusions  
 19 couched as factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule  
 20 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements  
 21 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain  
 22 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its

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 24 <sup>3</sup> Plaintiff correctly notes that the standard applied in the Court’s Screening Order is analogous to the standard  
 25 applied in a Motion to Dismiss under Rule 12(b)(6). (Resp. at 9–10, ECF No. 20). Unlike when a court  
 considers a plaintiff’s claims for screening purposes, however, when a court considers the claims at the motion to  
 dismiss stage, the defendants may present a legal argument. Therefore, a claim that survives a screening order  
 will not necessarily survive a motion to dismiss.

1 face.”” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A  
 2 claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
 3 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This  
 4 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

5 If the court grants a motion to dismiss for failure to state a claim, leave to amend should  
 6 be granted unless it is clear that the deficiencies of the complaint cannot be cured by  
 7 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant  
 8 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in  
 9 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the  
 10 movant, repeated failure to cure deficiencies by amendments previously allowed, undue  
 11 prejudice to the opposing party by virtue of allowance of the amendment, futility of the  
 12 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

13 **III. DISCUSSION**

14 Defendants move to dismiss Plaintiff’s Amended Complaint on the following grounds:  
 15 (1) Plaintiff cannot establish that fibromyalgia is an objectively serious medical need;  
 16 (2) Plaintiff cannot establish that Dr. Bernales was deliberately indifferent; (3) Plaintiff cannot  
 17 establish that the grievance responders were deliberately indifferent; and (4) Defendants are  
 18 entitled to qualified immunity. (*See generally* Mot. Dismiss, ECF No. 15). The Court addresses  
 19 each argument in turn.

20 **A. Deliberate Indifference**

21 To bring a successful Eighth Amendment claim under a deliberate indifference theory,  
 22 Plaintiff must show (1) that he suffers from an objectively serious medical need, and (2) that  
 23 the prison official defendant subjectively “[knew] of and disregarded an excessive risk to  
 24 inmate health and safety.”. *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014). Mere  
 25 ///

1 negligence is not sufficient to establish a claim for deliberate indifference. *Farmer v. Brennan*,  
 2 511 U.S. 825, 835 (1994).

### 3       **1. Objectively Serious Medical Need**

4       For Plaintiff to be successful in his Eighth Amendment claim, he must establish that  
 5 treatment for fibromyalgia is an objectively serious medical need. *Id.* at 834. The Ninth Circuit  
 6 has “identified three situations in which a medical need is serious,” namely: “(1) ‘[t]he  
 7 existence of an injury that a reasonable doctor or patient would find important and worthy of  
 8 comment of treatment’; (2) ‘the presence of a medical condition that significantly affects an  
 9 individual’s daily activities’; or (3) ‘the existence of chronic and substantial pain.’” *Egberto v.*  
 10 *Nev. Dep’t of Corr.*, 678 Fed. Appx. 500, 503, 2017 WL 476577 (9th Cir. 2017) (quoting  
 11 *McGuckin v. Smith*, 974 F.2d 1050, 1059–60 (9th Cir. 1992), overruled in part on other  
 12 grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc)).

13       “The Court recognizes that fibromyalgia is a serious medical condition[.]” *Williams v.*  
 14 *Mansour*, No. 2:20-cv-0616 DB P, 2020 WL 6682849, at \*4 (E.D. Cal. Nov. 12, 2020).  
 15 Plaintiff alleges the presence of a medical condition significantly affecting his daily activities  
 16 and the existence of chronic and substantial pain. (Resp. 8:20–26, ECF No. 20). Specifically,  
 17 Plaintiff contends that his fibromyalgia “causes [him] extreme full-body pain” that “often limits  
 18 [his physical activity] and “causes extreme fatigue,” making it nearly impossible for him to  
 19 sleep or work.<sup>4</sup> (FAC at 5).

20       Rather than challenge Plaintiff’s allegations under the extensive Eighth Amendment  
 21 case law discussing whether a medical need is serious, Defendants rely on Ninth Circuit  
 22 decisions pertaining to social security, which note the difficulty of objectively measuring

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 24       <sup>4</sup> Plaintiff provided a printout from WebMD explaining the causes and symptoms of fibromyalgia as an exhibit  
 25 attached to his Amended Complaint. (WebMD Page, Ex. H1, FAC at 63, ECF No. 5). “Generally, a district  
 court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.” *Hal Roach*  
*Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). “However, material which is  
 properly submitted as part of the complaint may be considered.” *Id.*

1 fibromyalgia and similar diseases. (ECF No. 15, 5:15-28–6:1-4). In *Byrnes v. Shalala*, the  
2 Ninth Circuit explained that the “existence and severity of pain[] are subjective phenomena, the  
3 extent of which cannot be objectively measured.” 60 F.3d 639, 642 (9th Cir. 1995). For that  
4 reason, the Ninth Circuit held that a claimant seeking social security benefits “must produce  
5 objective medical evidence of an underlying impairment which could reasonably be expected to  
6 produce the pain or other symptoms alleged.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.  
7 1996). Similarly, in *Benecke v. Barnhart*, the Ninth Circuit stated, “[f]ibromyalgia’s cause is  
8 unknown, there is no cure, and it is poorly-understood within much of the medical community.  
9 The disease is diagnosed entirely on the basis of patients’ reports of pain and other symptoms.”  
10 379 F. 3d 587, 590 (9th Cir. 2004); *see also Murry v. Apfel*, 201 F.3d 444 (9th Cir. 1999).

11 The Court acknowledges the difficulties in objectively measuring or diagnosing  
12 fibromyalgia. But the Court finds Defendants’ reliance on these cases disingenuous. First,  
13 Defendants fail to note the procedural and substantive differences between the social security  
14 cases they cite and the Eighth Amendment claim at hand. In these social security cases, courts  
15 are evaluating whether someone is entitled to an award of disability benefits. *See Benecke*, 379  
16 F.3d at 589. When a plaintiff claims deliberate indifference to a serious medical need,  
17 however, courts must determine whether the plaintiff received adequate medical care.  
18 Defendants’ conflation of the right to disability benefits and the right to medical care is  
19 unpersuasive.

20 Moreover, Defendants ignore case law in which courts acknowledge fibromyalgia as a  
21 serious medical need in the Eighth Amendment context. *See, e.g., Williams*, 2020 WL 6682849,  
22 at \*4 (“The Court recognizes that fibromyalgia is a serious condition, but plaintiff’s allegations  
23 against these suggest, at best, a difference of opinion as to the proper course of treatment for  
24 plaintiff’s condition and, at worst, negligence or even medical malpractice. They do not,  
25 however, suggest deliberate indifference.”); *Cody v. Beard*, No. 1:14-cv-01239-DAD-BAM-

1 PC, 2017 WL 3315184, at \*11 (E.D. Cal. Aug. 3, 2017) (suggesting that whether plaintiff's  
 2 fibromyalgia objectively presented serious medical need was triable issue of fact). Indeed, "it  
 3 is well established that 'the existence of chronic and substantial pain'—such as pain associated  
 4 with neuropathy [and fibromyalgia]—is a serious medical need because the failure to treat it  
 5 could lead to the unnecessary and wanton infliction of pain contrary to contemporary standards  
 6 of decency." *Nall v. Adamson*, No. 3:19-cv-00054-MMD-CLB, 2021 WL 5541932, at \*4 (D.  
 7 Nev. Sept. 21, 2021), *report and recommendation adopted sub nom. Nall v. Anderson*, No.  
 8 3:19-cv-00054-MMD-CLB, 2021 WL 4935966 (D. Nev. Oct. 22, 2021) (quoting *Colwell v.*  
 9 *Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014)). Accordingly, the Court rejects Defendants'  
 10 argument that Plaintiff's fibromyalgia is not a serious medical need and finds that Plaintiff has  
 11 adequately alleged an objectively serious medical need.

## 12           **2. Defendant Dr. Wilson Bernales**

13           The Court next addresses whether Plaintiff has sufficiently plead that Dr. Bernales, the  
 14 only Defendant who allegedly treated Plaintiff, was deliberately indifferent. Defendants assert  
 15 that Plaintiff fails to allege facts demonstrating the Dr. Bernales knew of and disregarded an  
 16 excessive risk to Plaintiff's health or safety. (Mot. Dismiss 6:10–13). Additionally, Defendants  
 17 argue that Dr. Bernales "lacks the requisite subjective awareness required to establish deliberate  
 18 indifference." (*Id.* 6:15–16).

19           Plaintiff alleges that Dr. Bernales cut him off every time he tried to speak and wouldn't  
 20 listen to his medical problems. (FAC at 14). Despite Plaintiff's best efforts to explain his  
 21 condition, Dr. Bernales did not ask him any questions regarding his condition, did not let him  
 22 continue to explain how severe his pain was, never performed any physical exam, and never  
 23 prescribed any treatment. (*Id.* 13–15).

24           The Court finds that Plaintiff has sufficiently alleged that Dr. Bernales knew of and  
 25 disregarded Plaintiff's condition. Plaintiff alleges that he told Dr. Bernales about his condition

1 numerous times, and Dr. Bernales ignored his complaints. Taking these allegations as true, Dr.  
 2 Bernales' failure to provide any treatment or a physical exam was "medically unacceptable  
 3 under the circumstances," and Dr. Bernales chose not to act "in conscious disregard of an  
 4 excessive risk to [Plaintiff's] health." *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir.  
 5 2016) (quoting *Snow v. McDaniel*, 681 F.3d 978, 988 (9th Cir. 2012), *overruled in part on*  
 6 *other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014)).

### 7           **3. Grievance Responder Defendants**

8 Plaintiff alleges that Defendants Peret, Gutierrez, Williams, and Minev were deliberately  
 9 indifferent because they ignored Plaintiff's grievances. (Screening Order 8:14–15); (*see*  
 10 *generally* FAC 11–12; 15–18). But "[i]n order to be liable under § 1983 a prison official must  
 11 have done something more than fail to correct an alleged violation brought to their attention in  
 12 a grievance after the violation has occurred." *Hardney v. Moncus*, No. 2:15-cv-1842-KJM-  
 13 ACP, 2016 WL 7474908, at \*6 (E.D. Cal. Dec. 28, 2016). Plaintiff's Amended Complaint does  
 14 not allege anything more than the Grievance Responder Defendants' duty to respond to his  
 15 grievances. Accordingly, the Court GRANTS Defendants' Motion to Dismiss as to Defendants  
 16 Peret, Gutierrez, Williams, and Minev without prejudice.

### 17           **B. Qualified Immunity**

18 "The doctrine of qualified immunity protects government officials 'from liability for  
 19 civil damages insofar as their conduct does not violate clearly established statutory or  
 20 constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*,  
 21 555 U.S. 223, 231 (2009) (citation omitted). Thus, to overcome a claim of immunity, Plaintiff  
 22 must plead "facts showing (1) that the official violated a statutory or constitutional right, and  
 23 (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-*  
*Kidd*, 563 U.S. 731, 741 (2011). A right is "clearly established" when "[t]he contours of [a]  
 24 right [are] sufficiently clear' that every 'reasonable official would have understood that what he  
 25

1 is doing violates that right.”” *Jones v. Las Vegas Metro. Police Dep’t*, 873 F.3d 1123, 1130 (9th  
 2 Cir. 2017) (quoting *al-Kidd*, 563 U.S. at 741).

3 Although courts may consider a qualified immunity defense raised in a motion to  
 4 dismiss, determining claims of qualified immunity at this stage “raises special problems for  
 5 legal decision making.” *NAACP of San Jose/Silicon Valley v. City of San Jose*, 562 F. Supp. 3d  
 6 382, 395 (N.D. Cal. 2021) (quoting *Keates v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018)). “On  
 7 the one hand, [courts] may not dismiss a complaint making a claim to relief that is plausible on  
 8 its face.” *Keates*, 883 F.3d at 1234 (internal quotation marks omitted). “But on the other hand,  
 9 defendants are entitled to qualified immunity so long as their conduct does not violate clearly  
 10 established statutory or constitutional rights of which a reasonable person would have known.”  
 11 *Id.* at 1234–35 (internal quotation marks omitted).

12 Here, the Court has already determined that Plaintiff’s claim of deliberate indifference  
 13 against Dr. Bernales is plausible. To argue qualified immunity, Defendants broadly assert that  
 14 Plaintiff “cannot show that Defendants violated any right, much less a right that was clearly  
 15 established.” (Mot. Dismiss 9:3–4). But a “qualified immunity analysis often turns on the  
 16 specific facts of each alleged violation,” facts that are not yet developed before the Court. *See*  
 17 *NAACP of San Jose/Silicon Valley*, 562 F. Supp. 3d at 396. Accordingly, the Court DENIES  
 18 Defendants’ Motion as to the qualified immunity defense. This ruling does not preclude  
 19 Defendants from raising qualified immunity at a later stage in this litigation. *See id.* (“[T]he  
 20 court finds that the qualified immunity arguments are better suited to summary judgment.”).

21 **V. CONCLUSION**

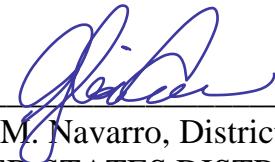
22 **IT IS HEREBY ORDERED** that Defendant’s Motion to Dismiss, (ECF No. 15), is  
 23 **GRANTED in part and DENIED in part.**

24 **IT IS FURTHER ORDERED** that Plaintiff’s claims against Defendants Ben Gutierrez,  
 25 Michael Minev, Nonilon Peret, and Julie Williams are **DISMISSED without prejudice**.

1           **IT IS FURTHER ORDERED** that if Plaintiff seeks to amend the claims dismissed  
2 without prejudice in this Order, Plaintiff shall have forty-five days from the date of this Order  
3 to do so.

4           **IT IS FURTHER ORDERED** that Plaintiff's Motion for Enlargement of Time, (ECF  
5 No. 17), is **GRANTED *nunc pro tunc***.

6           **DATED** this 6 day of July, 2023.



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8           Gloria M. Navarro, District Judge  
9           UNITED STATES DISTRICT COURT  
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